IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs October 15, 2002

JAMES NICHOLS v. STATE OF TENNESSEE

Post-Conviction Appeal from the Criminal Court for Davidson County
No. 95-A-73 Steve R. Dozier, Judge

No. M2002-00135-CCA-R3-PC - Filed August 19, 2003

A Davidson County trial jury convicted the petitioner of first degree murder, for which he received a life sentence. State v. Nichols, 24 S.W.3d 297, 300 (Tenn. 2000). Thereafter, the petitioner unsuccessfully sought appellate relief from both this Court and the Tennessee Supreme Court. See id. at 298; State v. James C. Nichols, No. 01C01-9704-CR-00158, 1998 WL 468638, at *1 (Tenn. Crim. App. at Nashville, Aug. 12, 1998). Through the present appeal the petitioner seeks post-conviction relief from his conviction, alleging that his trial attorneys did not provide effective assistance of counsel. More specifically, the petitioner asserts that counsel failed to interview and call needed witnesses and that counsel failed to object to inappropriate questioning of a witness by the trial court. We have reviewed these allegations and find that neither merit relief; therefore, we affirm the lower court's denial of post-conviction relief.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Trial Court is Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which DAVID G. HAYES and JOHN EVERETT WILLIAMS, JJ., joined.

Dwight E. Scott, Nashville, Tennessee, for the appellant, James Nichols.

Paul G. Summers, Attorney General & Reporter; Helena Walton Yarbrough, Assistant Attorney General; Victor S. Johnson, District Attorney General; and Jon P. Seaborg, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

Factual Background

In deciding the petitioner's case on direct appeal, the Tennessee Supreme Court summarized the facts as follows:

> The salient facts of record indicate that [the petitioner] lived with Barbara Sue Oakley, albeit intermittently, for approximately eleven years prior to the incident herein involved. On September 24, 1994, during a confrontation, [the petitioner] stabbed Oakley several times; she died six days later from the wounds inflicted.
> Several witnesses testified about [the petitioner's] excessive use of alcohol and his propensity to threaten to kill Oakley. [The petitioner] was heard to have made several such threats on the day of the altercation. In summary, the relationship between [the petitioner] and Oakley was, according to the testimony, quite stormy because of the threats and physical abuse by [the petitioner] and the heavy consumption of alcoholic beverages by both parties.
> Approximately one week before Oakley's death, her niece saw [the petitioner] point a knife at Oakley and tell Oakley that he was going to kill her. Although [the petitioner] had not been drinking prior to the above-described incident, he was upset because Oakley had recently informed him that she planned to move out of his residence to live with another man. On this occasion, as on others, Oakley ignored [the petitioner's] threats and did not appear frightened.
> During the (approximately) eight hours immediately preceding the stabbing, [the petitioner] and Oakley had consumed two half-gallon jugs of Wild Irish Rose wine. According to [the petitioner], the two were seated at [the petitioner's] kitchen table when they began to argue in the late afternoon of September 24, 1994. [The petitioner] then rose from the table, went toward the kitchen sink, and retrieved a knife from the drain rack. He then stabbed Oakley three times--twice in her abdomen and once in her upper left chest. Each stab wound was potentially life threatening. Oakley fled the kitchen and managed to reach a neighbor's house. Oakley was taken to Vanderbilt Hospital, where she died six days later. Two freshly washed knives were later discovered behind the kitchen sink.

Nichols, 24 S.W.3d at 299. As aforementioned, the trial jury convicted the petitioner of first degree murder after hearing this and additional evidence. See id.; James C. Nichols, 1998 WL 468638, at *1.

At an evidentiary hearing on his post-conviction petition, the petitioner presented proof through four witnesses. The relevant specifics of this testimony will be addressed within the analysis of the petitioner's claims.

Post-Conviction – Standard of Review

At the outset we observe that a petitioner bringing a post-conviction petition bears the burden of proving the allegations asserted in the petition by clear and convincing evidence. See Tenn. Code Ann. § 40-30-210(f). Moreover, the trial court's findings of fact "are conclusive on appeal unless the evidence preponderates against the judgment." Tidwell v. State, 922 S.W.2d 497, 500 (Tenn. 1996); see also Campbell v. State, 904 S.W.2d 594, 596 (Tenn. 1995).

Ineffective Assistance of Counsel – Standard of Review

A petitioner seeking post-conviction relief on the basis of alleged ineffective assistance of counsel must prove "that (a) the services rendered by trial counsel were deficient and (b) the deficient performance was prejudicial." Powers v. State, 942 S.W.2d 551, 558 (Tenn. Crim. App. 1996). To satisfy the deficient performance prong of this test, the petitioner must establish that the service rendered or the advice given was below "the range of competence demanded of attorneys in criminal cases." Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). Furthermore, to demonstrate the prejudice required, the petitioner "must show that there is a reasonable probability that, but for counsel's" deficient performance, "the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674 (1984). "Because a petitioner must establish both prongs of the test to prevail on a claim of ineffective assistance of counsel, failure to prove either deficient performance or resulting prejudice provides a sufficient basis to deny relief on the claim." Henley v. State, 960 S.W.2d 572, 580 (Tenn. 1997). Indeed, "a court need not address the components in any particular order or even address both if the [petitioner] makes an insufficient showing of one component." Id.

Failure to Investigate and Call Needed Witnesses

The petitioner first argues that his trial counsel failed to locate, interview, and call witnesses important in establishing the victim's aggressive nature and/or rebutting testimony regarding the petitioner's prior assaultive behavior toward the victim. Though the petitioner's brief references "witnesses," he only discusses the failure to call Gail Fletcher, his sister. Ms. Fletcher was the only one of the three proposed necessary witnesses actually called at the post-conviction evidentiary hearing. A post-conviction petitioner making a claim regarding the failure to call a witness bears a duty to present the witness at the post-conviction hearing in order to enable this Court to determine whether his or her testimony might have altered the results of the trial. See, e.g., Black v. State, 794 S.W.2d 752, 757 (Tenn. Crim. App. 1990). Since the petitioner did not do so concerning the two individuals, other than Ms. Fletcher, he is not entitled to relief based on a claim that the failure to call these witnesses amounted to ineffective assistance of counsel.

In her testimony, Ms. Fletcher indicated that she had spoken with lead counsel during the trial about inaccuracies in Robert Spence's testimony. On direct appeal this Court summarized the relevant portion of Spence's testimony in the following manner:

> Robert Spence, next door neighbor to the [petitioner] at 22 Waters Avenue, saw [the victim] on September 24, 1994, [the date of the offense,] around 4:00 p.m. [The victim] was mowing Spence's grass while Spence was working on his car. The [petitioner] came over in Spence's yard and wanted the mower. When [the victim] refused to give [the petitioner] the mower, [the petitioner] told her he would take her in the house and "whoop her ass." [The victim] shrugged off the comment. Spence observed the couple fighting and arguing every day, with the [petitioner] constantly threatening [the victim]. [The petitioner] had threatened to kill [the victim] and bragged that he had given her a black eye. Spence related that [the victim] had a black eye every month.

James C. Nichols, 1998 WL 468638, at * 5. With respect to black eye allegation, the petitioner's post-conviction counsel asked Fletcher if she had made trial counsel "aware of the fact that [she] had knowledge that – that Mr. Spence had testified to something that – that [she] could rebut" to which Fletcher responded, "I did. I told [lead counsel] in the hallway that that was not true testimony. And he said, 'Well, the [j]ury doesn't pay attention to things like that anyway.'"[1]

Fletcher also recounted instances in which the victim had been verbally threatening or abusive to Fletcher and the petitioner. For example, Fletcher testified that she had heard the victim threaten to "kill [the petitioner's] ass." Furthermore, Fletcher testified that she had expressed to lead counsel her willingness to testify if needed. While she acknowledged that she had spoken with trial counsel in person on two occasions prior to trial and via telephone on others, this witness stated that counsel had expressed no interest in calling her after learning that she had not been present at the time of the offense.

Nevertheless, Fletcher's testimony was not completely favorable to the petitioner. On cross-examination, this witness acknowledged that both the victim and the petitioner would "start getting nasty with people" when intoxicated. Though she was clear that the petitioner had never struck their mother, Fletcher also admitted that their mother had called the police about the petitioner while being verbally assailed by him in the same year as the murder.

In addition to Fletcher, both of the petitioner's trial attorneys and the petitioner testified at the post-conviction hearing. The lead trial attorney provided the only other significant, relevant proof concerning whether to call Ms. Fletcher at trial. According to the record this attorney, at the time of the petitioner's trial, had practiced law for approximately twelve years and had tried around sixty jury trials of which approximately ten had involved murder charges. Lead counsel remembered talking to the petitioner about the possibility of putting Ms. Fletcher on the stand but could not recall what evidence they would have sought to admit through her. Additionally, counsel could not recall

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[1] In support of her ability to contradict Spence's claim that the victim had a black eye every month, Fletcher noted that, over a three-to-four-year period, she had gone to the home shared by her mother, the petitioner, and the victim once every week to ten days in order to assist her mother in various ways.

whether the petitioner had provided him with the names of potential witnesses to rebut Spence's testimony about the victim's alleged numerous black eyes. Though this attorney admitted that rebutting the testimony regarding the petitioner's alleged prior assaultive behavior would certainly have been helpful to their cause, counsel explained that he had not been impressed with Spence's testimony. More specifically, counsel stated that Spence had "sounded like he was puffing it up a little bit more than it was actually." Counsel then explained his concern at the time of trial that the defense would lend credence to the account and/or might emphasize Spence's testimony by calling another witness on the same topic. However, with the benefit of hindsight, trial counsel "acknowledged that we possibly should've put on Ms. Fletcher or – or someone else, if she – they were available" to address Spence's testimony.

In view of lead counsel's comment, we find it particularly appropriate to note clearly established precedent providing that a reviewing court is not "to 'second guess' tactical and strategical choices pertaining to defense matters or measure a defense attorney's representation by '20-20 hindsight'" when deciding ineffective assistance of counsel matters. Cooper v. State, 849 S.W.2d 744, 746 (Tenn. 1993). Thus, we observe that in addition to acknowledging that calling Fletcher might have aided the defense, lead counsel also provided a reasonable explanation of his tactical decision not to call her. Moreover, Fletcher's relationship to the petitioner might well have diminished the impact of her testimony. Additionally, this Court's opinion from the petitioner's direct appeal of his conviction reflects that the jury did in fact hear evidence concerning the victim's alleged threatening behavior toward others when she drank. See James C. Nichols, 1998 WL 468638, at * 6-*7, *9. The opinion references the petitioner's assertion that he had acted in self defense after she had "cut him" and testimony from the petitioner's mother explaining that she had left the home at the time of the offense because the petitioner and victim "were getting drunk earlier that day" and she "was afraid of [the victim] when [the victim] drank." Id.

We find that the petitioner has not shown by clear and convincing proof a reasonable probability that, but for the alleged deficient performance, the result of his trial would have been different. Since the petitioner has not met his burden of proof in this post-conviction proceeding, we conclude that he is not entitled to relief based on this allegation of deficient attorney performance.

Failure to Object to Questioning by the Trial Court

The petitioner next aruges that trial counsel provided ineffective assistance by not objecting to the trial court's questioning of a witness during a jury-out hearing. In arguing this issue, the petitioner contends that the trial court's intervention evidenced the court's lack of impartiality and rose to the level of a due process violation depriving him of a fair trial.

However, we need not delve into a detailed analysis of the matter. Our review of this Court's previous opinion indicates that the Court not only found the issue waived because of trial counsel's failure to object to the trial court's actions and to raise the issue in his new trial motion but also stated that "[e]ven if the issue were not waived, we fail to see from our review of the record that the [petitioner] was prejudiced due to the trial court's questioning of a witness during a jury out

hearing." See James C. Nichols, 1998 WL 468638, at *13.[2] As above-provided, a petitioner must show a reasonable probability that, but for counsel's alleged deficient performance, the trial would have had a different end. This standard is not met in view of the prior finding that no prejudice exists. We, thus, conclude that this issue also lacks merit.

Conclusion

For the reasons stated, we find that neither of the petitioner's claims merit relief. Accordingly, we AFFIRM the lower court's judgment.

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JERRY L. SMITH, JUDGE

[2] We note that our supreme court's consideration of matters in the direct appeal of the instant case was limited to jury instruction and sufficiency claims and did not address the concern raised within this issue as did this Court in its previous opinion. See Nichols, 24 S.W.3d at 298-99; James C. Nichols, 1998 WL 468638, at *13.